85-2063

NO. _____

Supreme Court, U.S.
FILED
JUN 16 1986
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JUNE TERM, 1986

VELMA L. RIGGS,
PETITIONER

V

VERNE ORR, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE AIR FORCE, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES-MATHER AIR FORCE BASE, LOCAL 1692,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VELMA L. RIGGS
6805 LARCHMONT DRIVE
NORTH HIGHLANDS, CA 95660

PROPRIA PERSONA

QUESTIONS PRESENTED FOR REVIEW

Whether the dismissal of a complaint as to one party without order or judgment and without resolving the action as to all claims and all parties a violation of petitioner's United States Constitutional Right, XIV, Section 1.

Whether the Civil Service Reform Act of 1978 imposes on the Union, acting by authority of the Federal Service Labor-Management Relations Statute as the exclusive representative of the agency, the duty to represent all employees of the agency when requested without reprisal and discrimination because of race.

Whether forged and altered documents are proper before the court when they purposefully misstate the law as to the exhaustion of administrative remedies and deprive a party from knowing about her rights or from having a fair opportunity at presenting them and to fully litigate all rights and defenses that she was enable to assert.

PARTIES INVOLVED

The following list is a complete list of all of the parties to the action:

PETITIONER

Velma L. Riggs

RESPONDENTS AND APPELLEES,

Verne Orr, Secretary of the United States Department of the Air Force, and
American Federation of Government Employees, Local 1692, affiliated with AFL-CIO

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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VERNE ORR, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE AIR FORCE, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES-MATHER AIR FORCE BASE, LOCAL 1692,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, Velma L. Riggs respectfully pray that a writ of Certiorari issue to review the memorandum and judgment of the United States Court of Appeals for the Ninth Circuit, entered March 17, 1986.

MEMORANDUM BELOW

The memorandum of the court of appeals for the Ninth Circuit, appears in Appendix "4a" attached hereto.

The District Court issued Order Granting Verne Orr's motion for summary judgment, District Court civil docket sheet number 52, Order Denying Motion for Reconsideration, civil docket sheet number 52a, Order Granting Motion to Dismiss without leave to amend, civil docket sheet number 12.

JURISDICTION

The memorandum of the court of appeals was dated on March 17, 1986. The judgment was entered on March 17, 1986(appendix 12a). The jurisdiction of the Supreme Court to review this case on Petition for Writ of Certiorari is invoked pursuant to 28 USC 2101(c). This petition has been timely filed pursuant to Rule 20.2 of this court within 90 days after entry of judgment.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U. S. Const. Amend XIV, Section 1, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 56(e) of the Federal Rules of Civil Procedure provides:

> (e). Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

28 Federal Procedure, L ED. 62:604 provides:

> It has been held that a waiver of the certification requirement of Federal Rules of Civil Procedure 56(e) cannot be extended to the instance of an initial Federal Rule of Civil Procedure 12(b)(6) motion converted to a motion for summary judgment, because

> of the possibility of inadequate notice of all parties that their case may not only turn, but be disposed of on basis of such an autnenticated attachment.

The Civil Service Reform Act of 1978, Section 7114(b)(i)(ii) provides:

> (b) Any examination of an employee in the unit by its representative of agency in connection with an investigation if-
> (i) the employee reasonably believes that the examination may result indisciplinary action against the employee; and
> (ii) the employee request representation.

The Collective Bargaining Agreement Between Mather Air Force Base and AFGE Local 1692 Article 1, section 1 provides:

> Section 1. The Employer hereby recognizes that the Union is the exclusive representative of all employees in the unit as defined in section 2 below, and the Union recognizes the responsibilities of representing the interests of all such employees without discrimination and without regard to membership in the Union.

The Labor Management Relations Act of 1947, Section 301, 29 USCA § 185 provides in part:

> Section 301(a) Suits for violation of contracts between an employer and

a labor organization---may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 301(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whome it represents in the courts of the United States.

STATEMENT OF THE CASE

This is an appeal from the memorandum and judgment by the United States Court of Appeals from the Ninth Circuit, affirming summary judgment for respondants and against petitioner.

Petitioner former attorney Byron C. Thompson timely brought this action against Verne Orr (herein respondent Air Force) and American Federation of Government Employees-Mather Air Force Base Local Number 1692(herein respondent AFGE). This action was brought on June 2, 1982 under Title Vll of the Civil Rights Act of 1978, as amended, 42 2000e et seq, and

the Civil Service Reform Act of 1978, 5 USC 7501 et seq, 5 USC 7101 et seq, and 5 USC 7116 et seq. This action was brought to redress certain unlawful employment practices, unlawful personnel practices, unfair labor practices, and to redress the deprivation, on account of race and petitioner exercise of rights under the Civil Service Reform Act of 1978, of certain contractual and employment rights belonging to petitioner. Jurisdiction in the Title Vll claims was conferred on the District Court by 42 USC 2000e-5(f)(1).

Default was entered by the clerk against respondent AFGE on November 24, 1982. Counsel Thompson failed tp prosecute the case and agreed with respondent AFGE without petitioner's consent to set aside default.

Respondent AFGE failed a motion to dismiss pursuant to 12(b)(6), Federal Rules of Civil Procedure (herein FRCP) for a more definite statement pursuant to Rule 12(e). In support of their motion, respondent AFGE alleged

that "paragraph 11 of the Fourth Count of Plaintiff's complaint are so vague and ambiguous that Defendant, AFGE Local 1692, cannot reasonably be expected to frame an answer." The complaint was clear enough to apprise the respondents of the nature of the suit against them so that they could answer.

The case came on for oral argument on May 23, 1983 and was dismissed in favor of respondent AFGE. The June 14, 1983 Order granted their motion to dismiss without leave to amend. The District Court's refusal to permit amendment of the pleadings was an abuse of discretion.

The order of dismissal did not disposed of all of the claims against all of the parties. The court had errored in entering the judgment pursuant to 54(b), FRCP.

Petitioner appealed to the court of Appeals. Counsel Thompson then failed tp prosecute the appeal and withdrew from the case.

The District Court had been divested

of jurisdiction to correct the error by the docketing of the appeal. The May 2, 1984 order stated in part:

> It is hereby ordered that the appellant file a motion to dismiss the appeal as improvidently taken in the court of appeals for the Ninth Circuit, F.R. App. Pro. 27(a).

The Court of Appeals issued an order on May 23, 1984, in light of the parties; reponses to the order of June 22, 1984, and in light of the District Court order of May 2, 1984, the judgment entered in the case on June 14, 1983, was vacated as improvidently entered. The appeal was dismissed for lack of jurisdiction.

The District Court entered its order of September 18, 1984, naming two remaining parties in the action, namely petitioner and respondent Air Force.

The respondent AFGE defaulted by not answering the Status Report pursuant to Local Rule 125. The report stated in part:

> However, this defendant understands

> that the Order Granting Motion to Dismiss stands unaffected. Therefore, this defendant anticipates no further participation in this case.

Whether it is proper before the court for a respondent to disrespect court procedures and the law by not participating in the case.

Counsel Elaine W. Wallace filed petitioner's amended complaint. The first cause of action in the amended complaint was brought against respondent Air Force for relief to redress deprivation of rights secured to petitioner by Title Vll of the Civil Rights Act of 1964, as amended, 42 USC 2000e et seq. The second cause of action was brought against respondent AFGE for relief to redress the deprivation of rights secured to petitioner by 29 USCA 185. The respondents failed to address the amended complaint.

The amended complaint was submitted late on December 3, 1984. Counselor Wallace eliminated some of the charges against the respondents. To eliminate any charges against

the respondents is an abuse of discretion and an abridgement of petitioners Constitutional and Civil Rights.

Richard K. Willard, acting assistant attorney general submitted the respondent motion and supporting declarations for summary judgment. The respondent Air Force counter motion and respondent AFGE claims relate to petitioners claims. Their claims arise out of the same cause of action. The motion was not timely filed. Petitioner opening brief stated in part:

> The motion did not include the name of all the parties or any appropiate indication of other parties pursuant to Rule 10, FRCP.

Oral argument came on January 14, 1985 and was dismissed for the second time in favor of the respondents.

Petitioner requested counselor to do objections. Counselor Wallace informed us that she was denied the right to do objections because of petitioners race. Petitioner filed

objections to the dismissal of the respondents and documents used in support of summary judgment(number 53 on the docket sheet). To deny petitioner the right to do objections to her case violates her Constitutional and Civil rights. The objections are waived if not raised in the District Court and may not be brought up on appeal.

When petitioner filed objections, counsel Wallace filed request to the court that Ms riggs letter not be considered motion for reconsideration.

Petitioner was denied equal access to the documents in court files. It appeared that the District Court was withholding documents from the case file to keep petitioner from objecting to any form of the action in a timely manner (petitioner reply brief, page 23-24).

Petitioner was deprived of discovery. She was also denied request for all copies of documents as it pertain to her in the repon-

dents files. The documents were further denied under the Freedom of Information Act.

Petitioner timely filed and properly executed her opening brief on August 9, 1986. The same requirements are not being used with the respondents. Respondent Air Force opening brief was filed late on september 23, 1985 and was not properly executed.

Respondent AFGE was excluded from the January 22, 1986 appeals court order.

In determining whether there is substantial evidence, the federal courts at least, must consider the whole record without prejudice and not just the case presented by the respondents.

REASONS FOR GRANTING THE PETITION

Petitioner, Velma L. Riggs, a black woman, was a GS-3 part-time civil service worker. She was career-conditional and covered under the civil service retirement system. More specifically, she had retention

rights. Petitioner was also an Official Shop Steward for respondent AFGE.

This case involves the issue whether the original complaint and the amended complaint were deprived of equal benefits of all laws and proceedings because of race.

Petitioner object to the memorandum because it lack specificity and clarity. The memorandum did not specifically address all the issues in petitioners complaint.

The memorandum based its conclusion on some court records. The court records contained; documents not in compliance with FRCP 56, fraud, and continuous gross errors in the record made with willful wanton acts of knowledge against only the petitioner. For example, where is respondent AFGE memorandum pursuant to Order Denying Motion for Reconsideration, docket number "52a," where is the judgment that recognize respondent AFGE in the "above caption case

The original complaint states quite

explicity all of the claims raised by petitioner in her March 16, 1981 and April 25, 1981 complaints (exhibit C and N in resopndent Air Force opening brief addendum).

Respondent Air Force arbitrarily and discriminatorly rejected the unlawful personnel practices and the unfair labor practices from the March 16, and April 25, 1981 complaints and thereafter alleged failure to exhaust administratives.

At the time of the rejection of issues respondent AFGE was in violation of 5 USC 7116 (b)(1) and other sections of the Civil Service Reform Act interfered with petitioner right to act as an official Shop Steward in the incident regarding Manager Robert Bowls grabbing Sylvester Kieth, and calling him nigger names in front of others. Bowls was not removed from the job. Thereafter, petitioner was held imprisonment in a lock room against her will, and respondent AFGE refused to process the

grievance according to its Collective Bargaining Agreement. Petitioner suffered irreparable harm, damage, and injury. Those issues have not been address.

The rejection of issues were timely appealed and the court file contained a April 23, 1981 letter from Robert Baker in Texas who stated in part:

> "Initial Interview-Counseling Worksheet" dated 19 Feb 1981, a specific remedy sought was "Removal of reprimand and removal of notation on SF Form 971."

A conflict of interest exist between the fraudulent April 23, 1981 appeal right from Jose Arredondo in Texas and the April 23, 1981 letter from Robert Baker in Texas. The documents are also not in compliance with FRCP 56,

Petitioner have no authority to review the counselor's notes to insure all of her issues were addressed. The procedural aspects of grievance handling were improper and discriminatory because white employees were not

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deprived of redress of grievance as compared to petitioner who sought redress but was subjected to reprisals and fraudulent appeal rights. The fraudulent appeal right affects all minority government employees similarly situated as peti tioner on Mather Air Force Base and other government agencys.

The appeal rights were forged and altered documents based on heresay, and they failed to set forth the findings, analysis, and decisions that specifically addressed which issues were accepted. They did not specifically provide the rihgt to appeal the rejection of issues as guaranteed by 29 CFR 1613.215, 29 CFR 1613.221. 29 CFR 1613.233. and 29 CFR 1613. 281 as stated in petitioners reply brief, pages 5 through 8. The document was not in compliance with FRCP (appendix 3a). The respondents have not address the forged and altered document issue.

The agency decision was not final be-

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cause they failed to make a determination on all of the issues in the complaint prusuant to 29 CFR 1613.271.

The EEOC fraudulent right-to- sue letter failed to acknowledge petitioners evidence, March 16, and April 25, 1981 letters and addressed all the issues in her complaint. It appears that a conspiracy existed between respondents and the EEOC. The document was not in compliance with FRCP 56(exhibit J in respondent Air Force brief addendum).

One of the serious problems is that the District Court and the Appeals Court have failed to protect petitioners Constitutional and Civil Rights.

Another serious problem is that the respondents and the courts evades the forged documents and the law requiring conjunctive use of the regulations. The documents were purpose fully used to misstate the law as to the exhaustion of administrative remedies. To forge

and alter appeal rights is a crime unless it is authorize by law. US ED Digest, Administrative Law 87. What law authorized the forge and altering of the April 23, 1981 appeal right by Jose Arredondo.

The agency appeal rights was considered to be an integral part of the regulatory statute that governs substantive due process to all employees regardless of race, color, religion, sex, or national orgin. The agency was required to, but failed to provide rejection of issue letter. If petitioner is deprived of her rights, how would she know how to properly appeal them. The respondents have failed to address the rejection of issue letter.

In reference to the rejected claim, petitioner timely filed a December 15, 1980 racial discrimination complaint and respondent AFGE letter stated in part:

> The letter of reprimand dated December 3, 1980, and presented to Mrs. Riggs on December 10, 1980, is in direct violation of Civil Service Act

of 1978, as covered in Title VII, Section 7114, Paragraph 2, Subparagraph a & B, which states an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be presented at:

The respondent AFGE did not make a determination on any issues in the letter and they refused to process the complaint through and including arbitration (appemdix 1a). They have refused to address the reprimand issue and is not properly participating in the case.

Prior to the reprimand petitioner filed a complaint against a white lieutenant who had verbally abusive her in the presence of both customers and other personnel because she asked him for his ID since he was using a check to pay for his groceries. Standard procedure for commissary patrons was followed. There was no apologies from the lieutenant.

Further, petitioner had worked in the on-call capacity as stated by supervisor and had confronted her Union. On-call employee is eligible for health and life insurance benefits

and also earned leave. Petitioner was covered under the Civil Service Retirement System but was told that she was not eligible for health and life insurance coverage in the on-call capacity.

The Chief of the EEO Colonel Bruce H. Mosely responded to petitioners complaint and his letter stated in part;

> A full review was made of your grievance of 15 Dec 1980 regarding the issuance of your letter of Reprimand, 3 Dec 80.

Respondent Air Force did not make a determination on the issues in the racial discrimination complaint to correct the wrong nor did they afford petitioner any protectional rights (appendix 2a).

Respondent Air Force used petitioners race as the prime factor in personnel decisions determinative of whether she would have more favorable rmployment status. Petitioner received the retailatory reprimand and thereafter a reduction in work hours.

Petitioner received a severe reprimand with a two year penalty in her personnel record. There is no reprimand listed with a two year penalty in the AF-750 regulation, Title "Guide to Disciplinary Action." The highest penalty listed is fourteen days. Because of the respondents inproper motive petitioner has suffered irreparable harm, damage and injury. Further, petitioner was the only employee in the history of Mather Air Force Base who received such an improper, unjust and unwarrent reprimand.

Petitioner working hours were reduced in response to her exercise of statutory and contractual rights to union represantation through threatened and actual adverse personnel action in retailation for petitioners attempt to exercise her right to union representation. Respondent AFGE have refused to address those issues and properly participate in this case.

In the January 14, 1985 transcript,

Jeffrey S. Paulsen stated to the court in part:

> And we have included in our motion a declaration from the plaintiff's supervisor which states that she was required to reduce the hours across-the-board for budgetory reasons.

Counselor Patricia Thomas declaration was filed unexecuted, late and not in compliance with FRCP 56 (docket number 47). The report stated in part:

> Scheduling problems arose when cashiers were scheduled for five hours plus a lunch break. For example, cashier "A" comes in at 0800 and works until 1300 with one rest break; cashier "B" comes in at 1300 and works until 1800.

The "new" schedules for cashiers working hours were not posted but was by word of mouth and without witness. Petitioner worked only 4.0 hours. Based on respondent Air Force exhibit A-8, no two five hour shifts existed. However, the cashiers did work irregular hours. They worked 6.4 hours, 7.0 hours, or 4.0 hours. If there were two five hour shifts, how do you squeeze 7.0 hours, or 7.7 hours into a five

hour shift.

If the across-the-board reduction in cashier hours were only for pay periods ending on January 24, through February 21, 1981, and the cashiers hours across-the-board "increase," the budgetory reasons given by Paulson are in direct conflict with the March 7, 1981 column of respondent Air Force exhibit. The supervisor continued to hire more white cashiers.

After respondent Air Force decision to reprimand, Lois D. Palermo declaration now state in part:

> In approximately December 1980, I was directed by the Mather Commissary store manager to reduce the total number of hours worked by the checkers. To accomplish this I decided to schedule an intermittent or part-time checker in a five hour shift, without a lunch break, from 8 a.m. to 1 p.m., and another from 1 p.m. to 6 p.m.,--

Lois D. Palermo declaration was filed unexecuted, late and not in compliance with FRCP 56. Palermo is discussing one or two cashiers working hours. However, there is only

one cashier who appeared to have worked 5.0 hours. Further, all of the black cashiers "sworn affidavits" are in direct conflict with Palermo declaration regarding the two five hour shifts. The respondents have not address the two five hour shift issue. The Exhibit A-8 is clear on its face and not consistant with two five hour shift (petitioners excerpt record, exhibit 18).

During employment with respondent Air Force, petitioner could not fully compete with other employees for advancement but partically because of illegal discrimination, her earned Civil Service rating was reduced ten points (see personnel folder). The reduce rating is clear on its face for the courts and the public to review.

The Appeals Court March 17, 1986 memorandum stated in part:

> On April 28, 1981, Riggs was notified that she was being removed from her job. Causes given for her removal included; being discourteous to a cus-

> tomer, disobeying the orders of her supervisor to discuss her proposed suspension, and being absent without official leave.

The April 28, 1981 document by Lois D. Palermo is not in compliance with FRCP 56 but is in conflict with petitioners April 25, 1981 letter giving notice of the firing on the spot on April 22, 1981 and letter of April 23, 1981.

The April 22, 1981 wrongful removal date is vertified in respondent AFGE February 15 1983 motion to dismiss and the 1983 transcript and paragraph "e" of the proposed removal.

Respondent AFGE arbitrarily and discriminatorly denied petitioner representation when disciplinary action was being taken against her by respondent Air Force. Respondent Air Force also denied representation and witness. The April 28, 1981 document further show that the supervisor continued to order and harass petitioner to to behind close doors alone while she was taking disciplinary action against her. Using petitioners request for

representation during discussions regarding proposed suspension, and fired petitioner on the spot from its employment on April 22, 1981 in front of customers and other commissary employees. The April 28, document did not set forth proof of its allegation in the record. The document is clear on its face for the court and the public to review. The respondents have not address the wrongful removal issue.

At the time of the wrongful removal petitioner had charges of job discrimination on the bases of race against respondent Air Force pending in the Equal Employment Opportunity Commission and thereafter named her union, EEO, and others in the April 25, 1981 letter.

After the April 25, 1981 wrongful removal letter was forward to respondent Air Force, what action did they take on it.

Respondent Air Force failed to confront petitioner's representative Preston

Thompson Jr who worked in the Commissary meat department (see exhibit 22 and 31 in petitioner excerpt of record). Respondent Air Force has not address petitioner representative issue.

Respondent Air Force defaulted and admitted their total failure to process the wrongful removal action (see declaration of Patricia Thomas, docket number 47).

Respondent AFGE Order Denying Motion for Reconsideration stated in part:

> §301 of the Labor Management Relations Act, 29 U.S.C. §185, is not applicable to the Plaintiff herein in that the Labor Management Relations Act only applies to the employment in the private sector and does not apply to federal employment.

The §301 of the Labor Management Relations Act, 29 U.S.C. §185 also provided in part:

> Section 301(e) For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the ques-

> tion of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

However, under section 2000e et seq., of Title 42, a petitioner alleging employment discrimination is not required to allege a violation of this section in order to maintain an action against a union. Massey v Illinois Range Co., DC Ill. 1973, 358 F. Supp. 1271.

The case Fine v Barry Enright Productions, 731 F.2d 1394, 1396 (9th Cir.), cert. denied, 105 S. 248 (1984) do not apply to petitioner. Even though she was deprived of discovery and denied request for documents as it pertain to petitioner, she provided the courts with pleadings, points, authorities, declarations, together with exhibits, to show there exist genuine issues of material facts.

on behalf of the respondents, there are pleadings, supporting declarations, exhibits, orders, and judgments.

It is apparent that all declarations, exhibits, orders, and judgment of the parties set up assertions that are diametrically opposed, and taken together with the pleaded allegations contained in the complaint, create genuine issues as to material facts.

Furthermore, the respondents in the aboved caption case alleged that all the issues in petitioner case have been addressed.

Petitioner has suffered irreparable harm, damage, and injury. She is now at Collateral Estoppel for the purpose of this action to request respondent Air Force and respondent AFGE to submit proof and respond to the following:

1. Whether each document exhibit in the court files are genuine.

2. Whether each of the statements in the documents are true.

3. Proof that each document exhibited in the court files are genuine, sworn, certified, and was timely mail to petitioner.

4. Proof of each and every allegation made against petitioner for summary judgment.

CONCLUSION

The failure to exhaust was instituted out of racial bias. Summary judgment deprived petitioner of due process of law and equal protection of the laws in that the case was decided based on fraudulent documents that showed disrespect for the law and argument to change the law to suit ones purpose without the opportunity to confront and cross-examine witnesses and to have a full trial on all the issues.

The record show that petitioner is an abused and exploited victim of racism and that justice never existed for her in the courts because she is black. Justice delayed was justice denied to her for five years.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Velma L. Riggs
6805 Larchmont Drive
North Highlands, CA 95660

PROPRIA PERSONS

June, 1986

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

MATHER A.F.B. LOCAL No. 1692

MATHER AFB, CALIFORNIA 95655

Phone (916) 363-6441

December 15, 1980

Colonel Bruce H. Mosley
323 ABG Commander
Mather A.F.B., CA 95655

Subject: Grievance, Mrs. Velma Riggs (Letter of Reprimand)

Dear Colonel Mosley:

The letter of Reprimand dated December 3, 1980, and presented to Mrs. Velma Riggs on December 10, 1980, is in direct violation of Civil Service Reform Act of 1978, as covered in Title VII, Section 7114, Paragraph 2, Subparagraph a&b, which states an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at:

(A) "any formal discussion between one or more representatives, of the agency and one or more employees in the unit or their representatives, concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) "Any examination of an employee in the unit by a representative of the agency in connection with an investigation if;

(i) "the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) "the employee requests representation.

Mrs. Velma Riggs request that a union representative be present was denied by management, therefore, we ask this letter or Reprimand be removed from her official personnel folder at Civilian Personnel, also any remarks on her 971 in regards to this letter be removed and not used against her in further disciplinary actions.

Your upholding the employees rights under the Civil Service Reform Act of 1978 is requested.

William D. Fish
1st Vice President
A.F.G.E. Local 1692

Carl Adair
Chief Steward
A.F.G.E. Local 1692

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS 323D FLYING TRAINING WING (ATC)
MATHER AIR FORCE BASE, CA 95655

323 ABG/CC 30 December 1980
Grievance of Mrs. Velma Riggs

Mrs. Velma Riggs
OL OG AFCOMS

1. A full review as made of your grievance of 15 Dec 80 regarding the issuance of your Letter of Reprimand, 3 Dec 80.

2. I find correct procedures were followed and the issuance of the Letter of Reprimand was not in violation of Title VII, Section 7114, paragraph (a) (2) (A) and (B). The issuance of the letter did not include any formal discussion nor examination; consequently, Union representation was not required and the request was properly denied by Management.

3. On the basis of these findings, I cannot grant the remedy requested in your grievance. Therefore, the Letter of Reprimand and corresponding AF Form 971 remarks will remain on record until the date of expiration.

BRUCE H. MOSLEY, Colonel, USAF
Base Commander

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS TRAINING COMMAND
RANDOLPH AIR FORCE BASE, TX 78148

Notice of Final Air Force Decision on Your Complaint of Discrimination

Ms Velma L Riggs
6805 Larchmont Drive
North Highlands CA 95660

1. You have been informed by 10 April 1981 letter from the Vice Commander of Mather Air Force Base of the allegation which has been accepted. All other allegations are hereby rejected because they lack specifically and were not discussed with an EEO counselor in a timely manner.

2. If you are dissatisfied with this final decision, you have the following appeal rights:

a. You may file a notice of appeal to the Equal Employment Opportunity Commission Office of Review and Appeals within 20 calendar days of receipt of the decision and submit a brief or statement to EEOC in support of your appeal within 30 calendar days after filing your notice of intent. The appeal and any representations in its support must be submitted in duplicate, and a copy furnished to AFCAPA/ARB, Bolling AFB, Washington, D.C. 20332.

b. Your appeal should be addressed to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506.

c. Instead of an appeal to the Commission, you may file a civil action in a U.S. district court within 30 calendar days of receipt of the decision.

d. If you elect to appeal to the Commission's Office of Review and Appeals, you may file a civil action in a U.S. district court within 30 calendar days of receipt of the Commission's final decision.

e. A civil action may also be filed at any time after 180 days of the date of initial appeal to the Commission, if a final decision has not been rendered.

FOR THE COMMANDER
JOSE ARREDONDO
Acting Chief, Equal Employment
Opportunity & Affirmative Action Division
Directorate of Civilian Personnel

Exhibit F

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VELMA L. RIGGS,	)	
	)	
Plaintiff-Appellant,	)	No. 85-1704
	)	
v.	)	PC CIV 5-82-445
	)	RAR
VERNE ORR, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE AIR FORCE, and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES – MATHER AIR FORCE BASE, LOCAL 1692,	)	MEMORANDUM*
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Eastern District of California
Raul A. Ramirez, District Judge, Presiding

Argued and Submitted, December 12, 1985

Before: CHOY, Senior Circuit Judge, SKOPIL and SCHROEDER, Circuit Judges

This appeal concerns the district court's grant of summary judgment and dismissal of claims against a Title VII plaintiff for various claims against the plaintiff's employer, the United States Air Force, and union. We affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

I

BACKGROUND

The plaintiff, Velma L. Riggs, a black woman, was employed by the United States Air Force ("Air Force") as a part-time cashier in the Mather Air Force Base commissary in Sacramento, California. Riggs contends that prior to January 30, 1981, she contacted an Equal Employment Opportunity ("E.E.O.") counselor and had gone to her union, the American Federation of Government Employees — Mather Air Force Base, Local 1692 ("Union"), with grievances. She asserts that because her E.E.O. counselor, Patricia Thomas, informed her that she was required to choose between the E.E.O. procedure or the grievance procedure, she withdrew her grievance and was assigned another E.E.O. counselor. Riggs met with the counselor on February 19, 1981. She filed a formal complaint on March 16, 1981, alleging that her employer had racially discriminated against her by passing her over for promotion, reducing her working hours, giving her a letter of reprimand in retaliation for filing a grievance against her supervisor, maintaining a hostile work environment, constantly following and observing her, preventing her from performing her duties as union shop steward, and improperly handling her grievances.

On April 10, 1981, the Air Force sent Riggs a letter acknowledging receipt of her complaint and informing her of her rights if the complaint was accepted or rejected. Subsequently, Riggs received two letters indicating that only her working hours complaint was accepted. The April 23, 1981 letter discussed the reasons her other claims were rejected, and explained her right to appeal. Riggs did not appeal the rejected claims.

Riggs' hour reduction complaint was assigned an investigator, who found no evidence that her working hours were reduced because of race. Riggs was informed that she could challenge this proposed decision before it was adopted as the final decision. She did not enter a challenge. However, Riggs did appeal this final action to the E.E.O.C. Office of Review and Appeals. The decision was affirmed on April 30, 1982.

In an April 25, 1981 letter to the Air Force Director of the E.E.O.C. in Washington, D.C., Riggs alleged that she had been imprisoned against her will by her supervisor on April 10, 1981. She also commented that the Union refused to represent her in meetings with her supervisor. Moreover, she complained that she had been relieved of her duty without personnel action papers or counseling, and that she could not get a fair and impartial resolution of the matter through the Union.

On April 28, 1981, Riggs was notified that she was being removed from her job. Cause given for her removal included: misin-

forming a customer about the store's coupon policy, being discourteous to a customer, disobeying the orders of her superior to discuss her proposed suspension, and being absent without official leave. Riggs did not challenge her removal through the Air Force E.E.O.

However, Riggs' April 25, 1981 letter was forwarded to Mather Air Force Base for a determination of whether it constituted an attempted to file a complaint of discrimination. Riggs did not contact an E.E.O. counselor and officials at Mather were unable to reach plaintiff regarding the letter.

Riggs brought suit against Verne Orr, in his capacity as Secretary of the Air Force, alleging that she had been racially discriminated against by failing to promote her, reducing her working hours, retaliating against her for filing grievances, maintaining a hostile work environment, and ultimately terminating her. She also charged her Union with assisting the Air Force in discriminating against her through intimidating her. In an amended complaint, she withdrew several allegations previously made against the Air Force, and additionally charged the Union with violating its alleged duty of fair representation in failing to proceed to arbitration with her grievances.

The district court dismissed the complaint against the Union as to racial discrimination claims for failure to exhaust administrative remedies, and as to labor claims for lack of subject matter jurisdiction. However, due to a clerical error, judgment was issued dismissing the complaint against all defendants. Riggs appealed to this court. The district court, recognizing that the appeal had divested it of jurisdiction to correct the error, entered an order directing Riggs to file a motion to dismiss the appeal as improvidently taken. This court, on the basis of the district court's order, vacated Riggs' appeal. The district court than vacated the erroneous order, implicitly reaffirming the original order. It also denied Riggs' motion to reconsider the dismissal.

A motion by the Air Force for summary judgment was granted. The district court held that Riggs had not stated a prima facie case that the reduction in her working hours was due to racial discrimination. All other claims were dismissed for failure to exhaust mandatory administrative measures. Riggs timely appeals.

II
CLAIMS AGAINST THE AIR FORCE

A. Standard of Review

The district court granted the Air Force's motion for summary judgment against Riggs. We affirm the grant of summary judgment only if, after viewing the evidence in the light most favorable to the nonmoving party, there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Fine v. Barry & Enright Productions*, 731 F. 2d 1394, 1396 (9th Cir.), *cert. denied*, 105 S. Ct. 248 (1984).

B. Reduction in Hours Claim

The Air Force concedes that Riggs exhausted her administrative remedies and timely appeals the final action against her rejecting this claim. However, it argues that Riggs has not established a prima facie case of discrimination, specifically, that she has presented no evidence pointing to race as the "likely reason" for her reduction in hours. *See Douglas v. Anderson*, 656 F. 2d 528, 532 (9th Cir. 1981).

A prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)). While acknowledging that the test for a prma facie case will depend on the facts of a given case, the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), held that a plaintiff meets the test by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802.

While Riggs can arguably establish the first three parts of the test, i.e. she is black, she sought more hours, and she is qualified, she has not produced any evidence from which an inference could be made that white workers at the commissary were favored in the supervisor's assignment of work hours. We agree with the

finding of the district court that Riggs has failed to offer any evidence indicating that this reduction was due to racial discrimination. Indeed, the record of work hour assignments of the commissary employees during the period in question shows that black employees experienced no greater reduction in hours than did white employees. Morever, Riggs' supervisor stated in a declaration that Riggs could have been scheduled for additional hours, but that she refused to work shifts longer than four hours.

Riggs contends that the explanation given by her supervisor that there were two five-hour shifts and that Riggs refused to work longer than four hours without a lunch break is false. However, even if Riggs' contention is correct, the crucial fact that black workers experienced no greater reduction in hours than did white employees remains unaddressed. The mere fact that Riggs' hours were reduced, without facts indicating that the hours remained open or that they were filled with equally or lesser qualified white employees, is not sufficient to state a prima facie case of discrimination.

B. Other Claims Stated in the E.E.O. Complaint

Other than the reduction in hours complaint, Riggs alleged in her formal E.E.O. complaint filed on March 15, 1981 that the Air Force discriminated against her by 1) failing to promote her, 2) unjustly reprimanding her, 3) recording character attacks on her employment file, and 4) constantly observing and following her. The Air Force rejected these claims in a letter dated April 10, 1981, and reiterated this rejection in a letter dated April 23, 1981. Grounds for rejection included the lack of specificty of her claims and her failure to discuss the allegations with an E.E.O. counselor in a timely manner. Riggs admits that she received these letters.

In the April 23 letter, the Air Force explained to Riggs that she had 20 days to appeal the rejection before the E.E.O.C. Office of Review and Appeals or 30 days to bring action in federal district court. Riggs was informed of these rights in another letter dated April 10, 1981. Riggs did not appeal the rejection of the claims at issue before the E.E.O.C. She did not bring suit in the district court within the 30-day time period. The district court dismissed Riggs' claims, to the extent that they were alleged in the amended complaint, because Riggs "failed to exhaust the mandatory administrative remedies with regard to her rejected claims. . . ."

We affirm the dismissal by the district court of these claims, but not for failure to exhaust remedies; rather, we find that these claims were not alleged in the first amended complaint. Riggs' original complaint states quite explicitly all of the claims raised by Riggs in her initial E.E.O. complaint. However, the original complaint was amended by Riggs, deleting many of the claims

raised initially. Indeed, after comparing the original complaint with the first amended complaint, we concluded that among the allegations of discrimination in the original E.E.O. complaint, only the reduction in hours claims has been preserved in this action.[1] Because the rest of Riggs' claims were not alleged in the first amended complaint, those issues are not properly before this court.[2] *See Knutson v. Daily Review, Inc.*, 548 F. 2d 795, 804 n.8 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Katsev v. Coleman*, 530 F.2d 176, 179 (8th Cir. 1976).

C. Claim of Discriminatory Removal

Riggs sent a letter to the E.E.O. Director for the Air Force in Washington, asserting that she had been discriminatorily removed from her job. The letter was forwarded to Mather to determine whether Riggs was issuing a complaint. Riggs did not contact an E.E.O. counselor and officials at Mather were unable to reach her regarding the letter. We agree with the district court that Riggs is precluded from asserting this claim because she did not see an E.E.O. counselor regarding this claim, and thus failed to exhaust administrative remedies available to her. *See Boyd v. United States Postal Service*, 752 F.2d 410, 414-15 (9th Cir. 1985). Moreover, because of her prior knowledge of the grievance process, she cannot claim lack of notice of her obligation to see a counselor as ground for dismissal without prejudice to make an appointment to see a counselor. *See Ross v. United States Postal Service*, 696 F.2d 720, 722 (9th Cir. 1983).

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[1] In addition to the reduction in hours claim, Riggs alleges discriminatory termination in her first amended complaint. Other allegations appear to be factual allegations in support of her claim. To the extent they represent new discrimination claims, they are barred because they were not included in Riggs initial E.E.O. complaint. *See Scott v. Perry*, 569 F.2d 1064, 1065-66 (9th Cir. 1978).

[2] Moreover, we note that even if the first amended complaint could be construed to include some of Riggs' original, rejected E.E.O. claims, those claims would be barred because Riggs did not appeal the rejection, and thus failed to exhaust her administrative remedies. *See Gaballah v. Johnson*, 629 F.2d 1191, 1199 (7th Cir. 1980).

III
CLAIMS AGAINST THE UNION

A. Standard of Review

The district court granted the Union's motion to dismiss and denied Riggs' motion for reconsideration. Dismissal is upheld only when it appears certain that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1753 (1985).

B. Claim of Discrimination

We affirm the district court's dismissal of Riggs' claims against the Union for failure to exhaust administrative remedies. To the extent that Riggs' claims are based on Title VII, she did not include the Union in her E.E.O. complaint against the Air Force.

To the extent that Riggs' claims are based on the duty of fair representation imposed on the Union by Section 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1976), they were properly dismissed in light of the fact that Section 301 is inapplicable to Riggs, a federal employee.[3]

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[3] Section 301 applies to labor organizations that represents certain "employees." Under the Act "employee" does not include "any individual . . . employed by an employer . . . who is not an employer as herein defined." 29 U.S.C. § 152(3) (1976). The United States is not an employer under the Act. 29 U.S.C. § 152(2) (1976).

Moreover, a claim that a federal union has discriminated against an employee under Section 205 of the Civil Service Reform Act may be brought only after exhaustion of administrative remedies, i.e. 30 dys after receipt of notice of judicially reviewable action under section 7702. 5 U.S.C. § 7703(b) (2) (Supp. III 1979). Riggs has filed no claim except her suit in district court.

IV
CONCLUSION

We AFFIRM the district court dismissal of claims against the Union and grant of summary judgment in favor of the Air Force.[4]

[4] Riggs' additionally filed an inquiry concerning the propriety of the Air Force brief filed pursuant to this court's order for supplemental briefs regarding the Air Force's exhaustion defense. We find that the Air Force brief was properly filed and prepared, and that the requirements of Fed. R. App. P. 28 and 9th Cir. R. 13(b) for opening briefs are not applicable to the supplemental briefs at issue.

United States Court of Appeals
FOR THE NINTH CIRCUIT

VELMA L. RIGGS,

Plaintiff-Appellant,

vs.

VERNE ORR, Secretary of the United States Department of the Air Force, and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES – MATHER AIR FORCE BASE, LOCAL 1692,

Defendants-Appellees.

No. 85-1704

CV 82-0445 RAR

APPEAL from the United States District Court for the Eastern District of California (Sacramento)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento)

..... and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is affirmed.

COSTS TAXED

Filed and entered March 17, 1986